IN THE

Supreme Court of the United States

October Term, 1951

No. 448

FEDERAL TRADE COMMISSION,
Petitioner,

against

THE RUBEROID CO.,
Respondent.

BRIEF OF THE RUBEROID CO. IN OPPOSITION TO ISSUANCE OF A WRIT OF CERTIORARI ON PETITION OF THE SOLICITOR GENERAL.

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Preliminary Statement.

The Solicitor General, in behalf of the Federal Trade Commission, has petitioned this Court for issuance of a writ of certiorari to the Court of Appeals for the Second Circuit for review of a final decree of that court entered September 5, 1951 in a proceeding in which The Ruberoid Co. was petitioner and the Federal Trade Commission respondent. Said decree affirmed a cease and desist order of the Commission issued January 20, 1950 in a proceeding upon complaint pursuant to Section 11 of the Clayton Act (Title 15 U. S. C. sec. 21).

The Solicitor General does not complain of anything contained in the decree below. The decree is wholly favorable to the Government. It affirms the Commission's order

without modification. Review is asked only because the decree does not include a further provision enjoining respondent from violating the order.

The decree below does not deny an application for enforcement, for the simple reason that there was none. The Commission filed no answer or cross-petition to the petition for review of its order. At the end of its brief it made a bare, unsupported request that an injunction issue "pursuant to the statute", citing, with doubtful frankness, an inapplicable provision of the Federal Trade Commission Act. No violation or threat of violation of the order was charged, and no facts claimed to indicate need for an injunction were called to the court's attention.

On the initial hearing the question of enforcement was not argued, and the court upon affirming the order added the words "enforcement granted". Respondent thereupon petitioned the court for rehearing, pointing out that the Commission was not entitled to an injunction as a matter of right or of course, and asking the court in the exercise of its discretion to deny enforcement on the ground that the practices found unlawful by the Commission had long since been abandoned by respondent, that respondent had never asserted the validity of those practices or the right to renew them, and that there was no reason to apprehend renewal. The Commission opposed rehearing, but again was unable to point to any factual evidence of violation or threatened violation of its order within the limitations as to enforceability placed upon it by the court's opinion (R. 155). The court granted the petition for rehearing and struck the words "enforcement granted" from its decision. A decree was thereupon entered affirming the order, without injunctive provisions.

Questions Presented.

The principal and only substantial question presented by the Solicitor General's petition is whether the Court of Appeals, upon review and affirmance of the Commission's order, was "bound" under the statute to issue a decree enjoining violation of the order, upon the Commission's bare request, in the absence of any showing of non-compliance or threatened non-compliance or other evidence indicating a need for injunctive relief.

There is no question of jurisdiction. Jurisdiction to enforce was conceded below, and was not denied by the court. The Solicitor General's contention is that the court, "having power to enforce, had the duty to enforce"; that the court has no discretion in the matter; that although sitting as a court of first instance it is not free to apply the principles followed by courts of equity in injunction suits generally.

No case under Section 11 of the Clayton Act is cited in support of this proposition. No court has ever held that this statute contains a mandate to the court of appeals to enjoin violation of a Commission order upon affirmance, in the absence of any evidence of non-compliance or threatened non-compliance. As we will show, there has been no conflict among the decisions in the several circuits. During the thirty-seven years that this Act has been on the books the decisions of the courts of appeals have been remarkably consistent in their interpretation of the review and enforcement provisions of Section 11. There has not even been a "changing trend" in the decisions, toward a "newer and more direct procedure", as is stated in the dissenting opinion below.

At the outset of his petition the Solicitor General attempts to raise a false issue. It is stated that "the court

below held it was incumbent upon the Commission to show affirmatively that the party attacking the order had failed to comply with it." This is untrue, although the same assertion is repeated throughout the petition.

Referring to proceedings arising upon application of the Commission for enforcement, the court pointed out that

> "it is settled that the FTC cannot obtain a decree directing enforcement of an order issued under the Clayton Act in the absence of showing that a violation of the order has occurred *or is imminent.*" (Italics supplied.)

This much the Solicitor General concedes to be in accordance with prior judicial interpretation of Section 11 in all circuits. (In fact, the italicized words are somewhat in relaxation of the express statutory requirement making prior non-compliance with the order a condition precedent to an application for enforcement.) Passing over the doubtful sufficiency of the Commission's request for enforcement, the court continued:

> "we find unconvincing the FTC's reasons why, upon a cross-petition, it is not required to make the same showing of a *threatened* violation of its order as it must had it petitioned for enforcement." (Italics supplied.)

It is thus apparent that the court denied enforcement, not only because there was no showing of past non-compliance with the order, but because it found in the facts before it no basis for an inference of *threatened* violation calling for the exercise of its equity jurisdiction. The court pointed out that

> "the present petitioner did not deny that its original conduct violated the Act and there was uncontradicted evidence that the practice has been abandoned on which the FTC has not made a finding. *Under such circumstances* so much of our mandate as di-

rected enforcement of the order was premature and should be stricken." (Italics supplied.)

The importance of the distinction between a threat of future non-compliance with a cease and desist order, and actual prior non-compliance, as a basis for granting enforcement, is obvious. Courts of equity determine the necessity for enjoining an unlawful act or practice upon evidence indicating a threat or reasonable likelihood that the act or practice will thereafter be committed or engaged in. Prior non-compliance with a cease and desist order is only one among many facts from which a threat of future violation may be inferred. The need for an injunction may be inferred from the lack of any claim or showing of discontinuance of the forbidden practice, or from assertion by the respondent of the right to continue it, or from the mere failure of the respondent to oppose a request for enforcement. Here the court found no indication of any *threat* of non-compliance, and its decision was placed expressly on that ground.

Having attributed the decision below to "the absence of a showing of non-compliance", the Solicitor General proceeds to attack the straw man thus fabricated by citing a long list of cases for the proposition that the courts have "regularly" enforced orders held valid on petition for review "irrespective of compliance or non-compliance". These cases do not support the proposition for which they are cited. In none of them did the court hold that it had no discretion in the matter or that, in the absence of evidence of non-compliance, the statute makes an injunction mandatory. In many of them there was admission of non-compliance by failure to deny the allegations of the Commission's cross-petition, in some of them the practice forbidden was openly continued pending review, and in the others there was no claim of compliance and enforcement was not

opposed. The granting of injunctions under such circumstances falls far short of establishing that the courts treated this statute as making enforcement upon affirmance mandatory under any and all circumstances. So viewed, these cases are not at variance with the decision below.

The Solicitor General raises a subsidiary question by disputing the court's finding of evidence of record indicating abandonment of the practices found unlawful prior to the 1946 hearings. We doubt that this Court will be inclined to review this factual question. This case is of no public importance. It is concerned only with certain price discriminations in the sale of roofing materials found to have occurred in New Orleans in 1941. There is undisputed testimony that respondent's pricing policies in New Orleans were formulated to meet local competitive conditions and were not indicative of its pricing elsewhere; that in 1946 petitioner had, as to most products, adopted a one-price policy there; and that its remaining discounts there and elsewhere had been placed on a functional basis (R. 31-35). It is true that in 1946 respondent was granting true functional discounts on some products, in New Orleans and elsewhere, and still does so, but this case is not concerned with functional discounts. As the Commission stated in its brief below, "This order does not attack any functional differential granted or allowed to a purchaser in a particular functional class."

The Solicitor General's petition (p. 16) asserts that the testimony "indicates that at that time respondent had not abandoned its discount practices". The petition cites testimony as to carload discounts which were not challenged in this proceeding and which the court has said it would not regard as violations if justified by cost differences. The indication is that the Commission is still seeking enforcement of this order according to its terms in spite of

the clear indication by the court below that it has no intention of permitting such enforcement (R. 155). This matter has been fully covered in respondent's cross-petition for certiorari, and presents an additional reason why enforcement of the order should not be directed by this Court unless the order is first modified in the respects prayed below.

The Statute.

Review and enforcement of cease and desist orders of the Commission in Clayton Act cases is governed by Section 11 of that Act, the pertinent provisions of which are as follows:

> "If such person fails or neglects to obey such order of the commission * * * while the same is in effect, the commission * * * may apply to the circuit court of appeals of the United States * * * for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, * * *. Upon such filing of the application and transcript the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter * * * a decree affirming, modifying, or setting aside the order * * *.
>
> "Any party required by such order of the commission * * * to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order * * * be set aside. * * * Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order * * * as in the case of an application by the commission * * * for the enforcement of its order, * * *.
>
> "The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission * * * shall be exclusive."

The above provisions have been on the statute books for thirty-seven years, and have frequently been applied by the courts. This fact in itself, plus the fact that this Court never before has been asked to hold that the Act makes enforcement upon affirmance is mandatory, should arouse skepticism as to the existence of conflict between the prior decisions in the various circuits.

The scheme of the Act seems clear. If the order is violated, whether or not its validity is challenged, the Commission may apply to the court for enforcement. On the other hand, a respondent who desires in good faith to comply with the Commission's directive, but questions its validity or scope, may petition for review on that issue alone. In either case the court obtains jurisdiction of the proceeding and is empowered to affirm, modify or set aside the order. Upon a petition for review however, the issue of enforcement does not arise unless the Commission applies therefor by cross-petition or otherwise; and in that case the court, having jurisdiction of the proceeding, may grant an injunction if the need therefor appears, applying the principles followed by courts of equity in injunction suits generally.

The question of affirmance or modification, and the question of enforcement, are therefore separate and distinct. The one depends upon the validity of the order, in whole or in part, when issued. The other depends upon non-compliance, or (in case of affirmance upon petition for review) evidence of other facts indicating a sufficient threat of non-compliance to justify the granting of an injunction. Indeed, the Commission has no need or occasion to seek an injunction so long as there is no threat of non-compliance, and that is equally true whether the respondent does or does not exercise its right to have a review of the order's validity.

It is urged, however, that different considerations should govern the granting of an injunction when the respondent petitions for review than when the Commission applies for enforcement. Whether or not that might be deemed good policy, to so construe this statute would lead to rather absurd results. A petition for review by a respondent is a purely fortuitous circumstance so far as the Commission is concerned. Certainly Congress, in making non-compliance an express condition of an application for enforcement, did not intend the hurdling of that requirement to depend upon a circumstance over which the Commission has no control. If the intention had been to make enforcement dependent only on affirmance, Congress would have eliminated the hurdle, as it did later in the National Labor Relations Act.

The filing of a petition for review creates no additional reason or necessity for making enforcement mandatory. The statute evidently was enacted upon the assumption that Federal Trade Commission orders would in the great majority of cases be respected and complied with; that a respondent should have an untrammeled right to judicial review; and that only when the respondent is violating or threatening to violate the order is the court to be called upon to enforce. Experience has proved the wisdom of this plan, and proceedings by the Commission against violators have been relatively few.

The true and only difference in the considerations affecting enforcement in the two types of proceeding is that where the case is heard upon the Commission's application for enforcement, the required proof that the respondent has failed or neglected to obey the order serves a dual purpose. Such proof serves to validate the application, and to that extent is jurisdictional. And, violation having been proved, and the court having acquired jurisdiction of the proceeding, the same proof provides ground for the issuance of an

injunction. On the other hand, where the case originates upon petition for review, jurisdiction does not depend upon a showing of non-compliance, although such showing still will provide sufficient ground (and the only statutory ground) for enforcement. And it has been held in such cases, when the question has arisen, that the court, having jurisdiction of the proceeding, and even in the absence of evidence of non-compliance, may in its discretion grant enforcement whenever the facts before it indicate that an injunction is necessary or proper.

The Solicitor General claims that to allow the court of appeals any discretion in the matter of enjoining violation of a Clayton Act order will result in delaying and impeding enforcement. Quite the contrary is true, as may be readily shown. In the first place, in most cases where a respondent has petitioned for review the court has found need for enforcement and has issued an injunction. In the few cases, including the present case, where an injunction has been denied, the denial has been on the ground that the forbidden practice was discontinued long before the issuance of the order and there were no other facts indicating a threat of renewal. In such cases there is no reason to assume that the court was wrong or that there will be any further necessity for enforcement.

However, assuming that the respondent is plotting violation (which seems to have been the basis of Judge Clark's dissent below), a petition for review does not delay and may facilitate enforcement. In the present case, for example, nearly a year elapsed between the filing of the petition for review and the presentation of the case to the court. During that interval the Commission had ample opportunity to ascertain whether respondent was complying with the order. If it had obtained evidence of non-compliance the court undoubtedly would have received it. Without such

evidence the Commission could not have applied for enforcement anyway. Also, the petition for review relieved the Commission of the jurisdictional necessity of establishing non-compliance and it was at liberty to apply for enforcement upon a showing of any facts indicating that non-compliance was threatened.

Furthermore, where the Commission applies initially for enforcement, the court must determine two questions (1) the validity of the order, and (2) whether there has been non-compliance. In the present case, if the Commission should hereafter apply for enforcement, non-compliance will be the only issue, the validity of the order having already been passed upon. If the Commission is concerned about speedy enforcement of its orders it should be glad to have the question of affirmance decided and out of the way before occasion for enforcement arises.

There is a further and still more important consideration. Section 11 of the Clayton Act places no limitation on the time for enforcement or review. When the Commission issues an order of doubtful validity or scope, the respondent has the choice of petitioning for review or adopting his own interpretation of the order until such time as the Commission applies for enforcement. Most respondents prefer to petition for review so as to obtain as promptly as possible an adjudication of what changes in their business practices are necessary for compliance. But if it should now be held that if the order is affirmed upon review an injunction will issue as a matter of course, the respondent would be better advised to ignore the order until the Commission can catch up with him and obtain evidence of violation. If the Commission applies for enforcement the respondent can then raise every question as to the validity of the order that could have been raised on petition for review, and he will in addition have the benefit of a judicial

decision as to whether the specific practice charged constitutes a violation, and without any penalty if the charge of violation is upheld. The short cut now proposed would simply divert traffic from one channel to the other. It would penalize a respondent who petitions for review, would place a premium on violation, and would add to the enforcement burden of both the Commission and the courts.

Where An Order Is Affirmed On Petition for Review, and Non-compliance Is Not Shown, the Issuance of a Decree of Enforcement Is Discretionary.

Section 11 of the Clayton Act provides that the Commission may apply to the court of appeals for the enforcement of its order "if such person fails or neglects to obey such order of the commission * * * while the same is in effect". There is no exception to this requirement elsewhere in the section. The first step in enforcement is the issuance of an injunction. The statute plainly authorizes the Commission to apply to the court for an injunction when, and only when, the respondent has violated the order. Under those circumstances, and only under those circumstances, does the *statute* provide for the issuance of an injunction. The statute has uniformly been so construed.

Prior to amendment in 1938 the review and enforcement provisions of Section 5 of the Federal Trade Commission Act were identical with those of Section 11 of the Clayton Act. In a number of cases the Commission attempted, without success, to persuade the court of appeals to ignore the statutory requirement and grant enforcement after affirmance, in cases arising upon the Commission's application, without evidence of non-compliance. In *Federal Trade Comm.* v. *Standard Education Society*, 14 F. 2d 947, 948 (7th Cir., 1926), the court said:

> "If the court is to give any effect to the first sentence of this section, it must recognize the express condition upon which the Commission may apply for an enforcement order. It is only in case the respondent 'fails or neglects to obey such order of the Commission while the same is in effect' that petitioner has any standing in this court. Not only is this the plain provision of the statute, but petitioner's petition is drawn on this theory. * * *
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> "Petitioner's contention that the determination of this issue will unduly postpone the enforcement of its order is an argument that should be addressed to Congress rather than to this court. It was the apparent intention of the Congress to give the practicer of the alleged unfair methods an opportunity to mend its way before subjecting it to a decree of court, with its attending embarrassment. To accomplish this, the act provided that the petitioner could apply for an enforcement order *only* when its order was being neglected or disobeyed."

See also, *Federal Trade Comm.* v. *Morrissey*, 47 F. 2d 101, 102 (7th Cir., 1931); *Federal Trade Comm.* v. *Herzog*, 150 F. 2d 450, 452 (2nd Cir., 1945).

A proceeding upon application by the Commission for enforcement is an original proceeding in the court of appeals sitting as a court of equity. It is in reality a suit for an injunction against violation of the Commission's order. Since the Commission is authorized to apply for enforcement where, and only where, there has been non-compliance, proof of non-compliance serves both to satisfy the jurisdictional requirement and to provide ground for the injunction. No lesser proof will suffice, and no more is necessary.

Where the Commission has not applied for enforcement, and a petition for review is filed by the respondent, the jurisdiction of the court to affirm, modify or set aside the

order partakes more of the nature of appellate jurisdiction. The question of enforcement is not presented unless the Commission asks for an injunction by cross-petition or otherwise; although it may well be that the court, having jurisdiction of the proceeding, may decree enforcement of its own motion if the need for enforcement appears. If the Commission requests enforcement, and non-compliance is shown or is not denied, the Commission is entitled to an injunction equally as if the proceeding had originated upon application for enforcement. But if there is no showing of non-compliance, and therefore no statutory basis for an application by the Commission, the jurisdiction to enforce must rest solely in the court's equity jurisdiction over the proceeding. It follows that in that case the issuance of an injunction is discretionary, to be granted or denied upon application of the principles followed by courts of equity in injunction suits generally.

The statute is devoid of any mandate to the court of appeals to grant enforcement upon affirmance in the absence of non-compliance. Neither this Court or any court of appeals has ever construed the statute as containing such a mandate. In the few cases where the question has arisen the courts have uniformly held that where the order is affirmed on petition for review, and there is no showing of non-compliance, the decision whether to grant or deny an injunction is one lying within the discretion of the court.

The leading case (which the Solicitor General attempts to toss off as "an early decision contrary to the usual practice") is *L. B. Silver Co.* v. *Federal Trade Comm.*, 292 Fed. 752 (6th Cir., 1923). A petition for review was there filed by the Silver Company. The court affirmed the order with modifications; and the Commission moved for recall of the

mandate and for entry of a decree of enforcement. The court stated:

> "We directed a modification of the Commission's order in certain respects, and in other respects affirmed it. The Commission now asks that this mandate be recalled, and that this court enter its decree enjoining the Silver Company from further continuing those practices as to which we had affirmed the Commission's order. The ground of this application is that there must be an order of this court before there can be any enforcement of the Commission's order through punishment for violation; that if the application in this matter had been by the Commission for enforcement, instead of by the Silver Company for vacation, the court would have entered such an injunction order; and that, to avoid unnecessary forms and proceedings, such an order should likewise be entered when a petition for vacation is denied. * * *
>
> "It does not necessarily follow that the court should take the same action upon a petition for a respondent to set aside the Commission's order as upon a petition of the Commission to enforce; but, even if not, it would have been entirely proper for the Commission to couple with its answer in this case a cross-petition asking enforcement, and thus to present the question with all formality; and, if it were necessary, we would be inclined to permit, now, an amendment of the pleadings for that purpose. * * *
>
> "We are satisfied that our jurisdiction in matters of this class is original, even though the facts may have been so found as to be beyond controversy. The questions of law involved are presented to us for the first time to any court, and the jurisdiction is no more appellate than is the jurisdiction of the District Courts to vacate orders of the Interstate Commerce Commission. Hence it would seem that our decrees should be upon the lines adopted by courts of equity generally in hearing suits for injunction.

> "It is the general practice in such cases that if the defendant is continuing or threatening unlawful acts there will be an injunction; but if whatever was unlawful ceased long before the bill was filed, and as soon as it was brought to the attention of the defendant by complaint, and there is no reason to apprehend its renewal, the bill will be dismissed without prejudice. In the present case it is not claimed that any act which was found by this court to be unlawful was, after the Commission's order to desist, by the Silver Company so continued that there would have been any basis for a proceeding by the Commission to enforce its order, * * *. The situation, then, is that, as to the only substantial respect in which the Silver Company ever disobeyed the Commission's order, and as to which its enforcement could have been asked by the Commission, it has turned out that the Silver Company was substantially right, while as to the other matters of importance involved the practices complained of were discontinued long before the Commission's order, and there is no reason to apprehend a renewal. Hence the majority of us think that the situation does not call for any injunction."

The review and enforcement provisions of the Federal Trade Commission Act (prior to 1938 amendment) were later considered by the court of appeals for the Seventh Circuit in *Federal Trade Comm.* v. *Fairyfoot Products Co.*, 94 F. 2d 844 (1938). There, as here, it appeared that the respondent (Fairyfoot Company) "in fact had desisted from the objectionable practices long prior to the issuance of the 'cease and desist' order". The court defined its jurisdiction and function upon review as follows:

> "Under the terms of the Federal Trade Commission Act, as amended, 15 U. S. C. A., § 41 et seq., the Circuit Court of Appeals possesses a twofold function. At the request of one against whom the 'cease

and desist' order has been directed it has the power to review the proceedings of the Commission to determine whether the order should be affirmed, modified, or set aside. The effect of affirmance is to adjudicate the validity of the order of the Commission and to decree its effectiveness in the sense that disobedience of it by the one against whom it is directed would constitute an unlawful act. * * *

"Also by the terms of the Federal Trade Commission Act the Circuit Court of Appeals has the power to enforce valid orders of the Commission. In respect to this power of enforcement the act does not purport to grant any new power to the Circuit Court of Appeals, but assumes the existence of the equity power of coercion and obviously contemplates the use of this power. Consequently, federal courts have concluded that the decree of enforcement 'should be upon the lines adopted by courts of equity generally in hearing suits for injunction.'

"The language of authorization to the Commission to apply for enforcement of its order does not prescribe or authorize any particular type of enforcement procedure, and apparently it was the intention of Congress that the Circuit Court of Appeals should utilize the usual practice adopted by courts of equity in hearing suits for injunction and formulating decrees therein. * * *

"The necessary conclusion from the decisions of this circuit, and we believe from a proper construction of section 5, is that a general order of affirmance is not equivalent to a decree of enforcement; and that a decree of enforcement should be of the general nature and form of a decree of injunction, definitely fixing the duties of the party against whom the 'cease and desist' order has been issued.

"Nothing that has been said in this opinion is intended to question, or restrict, the wide discretion of the Circuit Court of Appeals to determine in one

> proceeding the various questions which section 5 authorizes the aggrieved party and the Commission to present to the Circuit Court of Appeals."

In other cases similarly arising the courts have granted enforcement, as a matter of discretion, where the circumstances indicated a threat of future violation.

In *Butterick Co. v. Federal Trade Comm.*, 4 F. 2d 910 (2nd Cir., 1925) the respondent petitioned for review and the Commission filed a cross-petition for enforcement. It appeared that Butterick was continuing to do business under the contracts held in violation of the Clayton Act. The court granted enforcement but stated that it would not have done so if there had been no violation of the order and if there were no threat of renewal of the unlawful practice. It was stated (p. 913):

> "The jurisdiction of the court in this proceeding is original rather than appellate, and, since it is the former, we may, in our own decree, protect the rights of the parties and in such form as it would be enforceable by us. Silver Co. v. Federal Trade Commission (C. C. A.) 292 F. 752. The decree should be along the lines adopted by the courts of equity in hearing suits of injunction. It is the general practice in such cases that, if the defendant is continuing or threatening acts, there will be an injunction, but, if whatever was unlawful ceased long before the bill was filed, and there is no reason to apprehend its renewal, the bill will be dismissed without prejudice."

In *National Silver Co.* v. *Federal Trade Comm.*, 88 F. 2d 425 (2nd Cir., 1937) the court granted enforcement after affirmance on petition for review for the stated reason that petitioner was asserting the right to continue the practice forbidden, in spite of petitioner's showing that it had discontinued the misleading marking of its products prior to the issuance of the order.

It is noteworthy that the *Butterick* case, the *National Silver* case and the present case were all decided by the Second Circuit. These three cases illustrate the exercise of the discretion of the same court in granting or denying enforcement under differing circumstances. In all cases where the question has been discussed the courts have treated the granting of enforcement after affirmance on petition for review as discretionary and in each case have set forth the reasons for the exercise of their discretion in issuing or denying an injunction.

Having found no support in the decisions under the Clayton Act, the Solicitor General points to the decisions under the National Labor Relations Act holding that the Labor Board is entitled to enforcement of its orders upon affirmance. The enforcement provisions of Section 10(e) of the Labor Relations Act. (29 U. S. C. 160(e)) are quite different from those of Section 11 of the Clayton Act. Section 10(e) permits the Board to apply to the court for enforcement directly upon issuance of a cease and desist order, and enforcement is conditional only on the validify of the order. Even when the respondent petitions for review the jurisdiction of the court is "to enforce, modify and enforce as modified, or set aside" the Board's order. Since a valid order is the only statutory condition of enforcement, the Board has been held entitled to enforcement upon affirmance, and this condition is equally satisfied whether the affirmance be upon application by the Board or petition by the respondent. Under the Clayton Act, an application for enforcement is conditioned on non-compliance with the order. There, likewise, the Commission is entitled to enforcement if non-compliance with a valid order appears or is shown, whether the proceeding originates upon application for enforcement or upon petition for review. But if the statutory conditions are not satisfied

enforcement may be granted only within the limits of the discretion of the court having jurisdiction of the proceeding.

There is no question here of this proceeding having become moot. The decision below was not on that ground. It may be conceded that discontinuance of the practice found unlawful, even prior to the issuance of the order, does not make the case moot and is no bar to enforcement where the court finds other indication of threatened non-compliance. (*National Silver Co.* v. *Federal Trade Comm.*, 88 F. 2d 425 (2nd Cir., 1937).) The order here, and the decree affirming it, remain in full force and effect, and enforcement, if the occasion arises, will have been expedited by the prior adjudication of its validity.

The Decisions of the Courts of Appeals Are Not in Conflict.

There has been no "changing trend" in judicial interpretation of the enforcement provisions of Section 11 of the Clayton Act, nor is there a "newer and more direct procedure", as stated by Judge Clark in his dissent below.

The courts have *always* made non-compliance a condition precedent to the granting of enforcement in a proceeding arising upon application of the Commission—not merely a *threat* of non-compliance, but actual non-compliance with the order after issuance. In no such case cited either by Judge Clark or in the petition here, was enforcement granted except upon evidence or admission of non-compliance. The Solicitor General seems to concede that this is the rule.

Where jurisdiction has been obtained on petition by the respondent for review, and the order has been affirmed in whole or in part, the courts have *never* denied enforcement

solely for lack of a showing of prior violation; and enforcement was not denied on that ground here. In the cases so arising the courts have *always* treated enforcement as discretionary and have made the issuance of an injunction depend upon *indication of a threat of future non-compliance.* Of course, in these cases, if prior non-compliance appears, or if the allegations of a cross-petition are not denied, or if the respondent makes no claim of compliance and does not oppose enforcement, an injunction will issue. Most of the cases cited here and in the dissent below are of that type. Such cases prove nothing except that where violation of the order is admitted or enforcement is not opposed the court is justified in inferring a threat of future violation and in granting an injunction.

The Solicitor General cites two decisions of this Court in support of the assertion that the courts have "regularly commanded obedience" to orders upheld on petition for review without regard to compliance: *Federal Trade Comm.* v. *Cement Institute*, 333 U. S. 683, and *Federal Trade Comm.* v. *A. E. Staley Co.*, 324 U. S. 746. In the *Cement* case the principal charge was conspiracy in violation of the Federal Trade Commission Act, although there was a subsidiary charge of Clayton Act violation. Under the former Act (as amended) the court had no discretion as to enforcement, and the question was not discussed. Furthermore, in both the *Cement* and *Staley* cases, the Clayton Act violations resulted from basing point pricing, and in both cases the Commission's order had been reversed by the court of appeals. The continued use of the forbidden pricing practices pending review by this Court was to be assumed in the absence of denial, and was in fact well known. In the *Staley* case, the Commission filed a cross-petition for enforcement in the court of appeals, charging that Staley had failed and neglected to comply with the order, and this

charge was not denied. It thus appears that in each of these cases this Court directed enforcement upon evidence of actual violation of the order upheld.

Going back thirty-seven years under the Clayton Act, and the Federal Trade Commission Act prior to 1938, it seems that in only four cases (including the present case) has a court been called upon to decide the propriety of issuing an enforcement decree upon an affirmative showing that the respondent had complied with the order in so far as valid, had discontinued the unlawful practice before the order was issued, and was not threatening to renew it. The rarity of such cases emphasizes the lack of importance of the present case. The prior cases are *L. B. Silver Co.* v. *Federal Trade Comm.*, 292 Fed. 752 (6th Cir., 1923); *Fairyfoot Products Co.* v. *Federal Trade Comm.*, 80 F. 2d 684 (7th Cir., 1935), petition to punish for contempt dismissed, *F. T. C.* v. *Fairyfoot Products Co.*, 94 F. 2d 844; *National Silver Co.* v. *Federal Trade Comm.*, 88 F. 2d 425 (2nd Cir., 1937). In the first two cases an injunction was denied; in the third case the court found other indications of a threat of violation and granted enforcement. In each case the matter was held to be one within the discretion of the court on the facts before it, and there is no case to the contrary.

A similar factual showing was made in three other cases wherein an order was affirmed on petition for review, but in none of them does enforcement appear to have been asked or granted. *Sears, Roebuck & Co.* v. *Federal Trade Comm.*, 258 Fed. 307 (7th Cir., 1919); *Guarantee Veterinary Co.* v. *Federal Trade Comm.*, 285 Fed. 853 (2nd Cir., 1922); *Fox Film Corp.* v. *Federal Trade Comm.*, 296 Fed. 353 (2nd Cir., 1924). If there has been any "changing trend," it is in the recent tendency of the Commission to regard every petition for review as a self-incriminating document sufficient in itself to call for the exercise of the injunctive

powers of the court. That was the attitude taken below, where it was asserted: "* * * implicit in the petition for review petitioner has served notice that it intends to continue the unlawful practices until this court by a decree of enforcement compels it to discontinue such practices".

Judge Clark's dissenting opinion below is the first opinion written during the thirty-seven years since enactment of the Clayton Act, tending to support the Commission's present contention. Even Judge Clark admitted that the court had a choice in the matter. Having finally obtained a dissenting opinion by a single judge, the Commission has deemed it opportune to present the question to this Court in a case otherwise woefully weak both as to the merits of the order and as to the need for enforcement. If it be accepted that the court below had any discretion to refuse enforcement, then certainly that discretion was not abused.

Petitioner Is Asking This Court to Amend the Statute. The Question Presented Is for Congress, Not the Courts.

The petition for certiorari states (p. 8) that the enforcement provisions of the Federal Trade Commission Act as originally enacted "are [not "were"] virtually identical with those of the Clayton Act." The petition fails to disclose that the Commission went to the Congress in 1938 and obtained an amendment of the former act in the respect in which it is here asking this Court to amend the Clayton Act by construction. Then, at page 15, the petition states, "It is well settled that an order issued by the Commission under the Federal Trade Commission Act will be enforced even though the practices thereby prohibited had been discontinued prior to issuance of the Commission's order",

citing recent decisions under the Federal Trade Commission Act as amended. This is, to say the least, misleading.

The facts are that in 1938 Congress amended Section 5 of the Federal Trade Commission Act, striking out the provision for enforcement upon application of the Commission, making the Commission's orders final unless the respondent petitions for review within 60 days, and prescribing penalties for violation. A clause was also added directing the Court of Appeals to issue a decree of enforcement in the event of affirmance upon review. The latter amendment would, of course, have been unnecessary if it had been true, as now asserted by the Solicitor General, that "the courts, to the extent that they have found the Commission's orders valid, have regularly commanded obedience thereto".

The original provisions of Section 11 of the Clayton Act have not been changed. If the Commission feels that the procedure provided by the latter Act is too lenient or unduly cumbersome, then, as stated by the court in *Federal Trade Comm.* v. *Standard Education Society, supra,* its complaint should be addressed to Congress and not to this court.

The complaint against the decision below is not a new one. The Commission has been making the same complaint in the courts of appeals for the past thirty years, and has always been rebuffed. (See *L. B. Silver Co.* v. *Federal Trade Comm.*, 292 Fed. 752, 753, 754, where the Commission in 1923 relied on this Court's mandate in *Federal Trade Comm.* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 456, to the same effect and issued under the same circumstances as its mandate in the *Cement Institute* case cited here.) It is obvious that this petition for certiorari was encouraged solely by Judge Clark's dissent below, which frankly ad-

vocates that the 1938 amendments to the Federal Trade Commission Act be adopted as a guide for judicial remodeling of the Clayton Act. It is understandable that after thirty leai. years without even a dissent in its favor the Commission is anxious to press this doubtful advantage even in an otherwise weak and unimportant case.

The Commission's principal and primary complaint in the past has been that it is required to allege and prove non-compliance with its cease and desist orders before it can obtain an injunction upon its own application. That statutory requirement is here conceded by the Solicitor General. He is now seeking to obtain a half loaf for the Commission, where only a whole loaf will suffice. For reasons hereinbefore stated, the construction urged, to be applied only in proceedings on petition for review, would make the enforcement procedure illogical and lopsided and probably would add to the enforcement burden of the Commission. The Commission's recourse is to Congress, not to this Court.

Conclusion.

This case is of no general interest or importance. It involves only the local pricing policies of a single company, engaged in ten years ago and not shown to have been continued thereafter. In its procedural aspect it presents a factual situation which has arisen not more than half a dozen times in thirty-seven years and will infrequently arise again. The decision on rehearing below is not in conflict with any decision of this Court or with any prior decision of a court of appeals. The question presented for review is one of policy which properly should be presented to Congress and not to the courts.

Furthermore, the order to cease and desist is too broad in scope, and the Court of Appeals has stated in its original

opinion that it will not enforce the order according to its terms. A mandate by this Court to enforce would imply approval of the terms of the order by this Court.

It is submitted that there is no occasion for further review of the decree below, and that the petition of the Solicitor General for writ of certiorari should be denied.

Respectfully submitted,

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